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No. 83-1911

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHRISTOPHER L. LOWE, LOWE PUBLISHING CORPORATION, LOWE MANAGEMENT CORPORATION AND LOWE STOCK CHART SERVICE, INC.,
Petitioners,

VS.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF OF FINANCIAL PUBLISHERS OF AMERICA AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The Financial Publishers of America, a nonprofit corporation recently formed as a trade association for publishers of financial and economic information (the "Association"), hereby respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in this case in support of the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit. The Association has sought the consents of the parties to the filing of this brief; the respondent has granted its consent, but the petitioners, whose position is supported by the brief, have not.

The decision below would grant an injunction permitting the Securities and Exchange Commission to ban completely the publication of a newsletter containing economic and financial information discussing investment in securities. The interest of the Association arises from the fact that this case will determine the First Amendment rights of a publisher to publish financial information not claimed to be either misleading or unlawful.

The Association is particularly well situated to address the crucial constitutional issues of fundamental concern to financial publishers generally. The Association believes its broader perspective may assist this Court in determining whether the regulation and prior restraint challenged here reach beyond the censorship of the one individual involved in this litigation and entail consequences of immense public importance.

WHEREFORE, it is respectfully requested that the Court grant the Financial Publishers of America leave to file the accompanying brief as *amicus curiae* to support the petition for a writ of certiorari to the Court of Appeals for the Second Circuit.

Dated: Washington, D.C.
June 22, 1984

Respectfully submitted,

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QUESTION PRESENTED

UNDER THE FIRST AMENDMENT, MAY A FINANCIAL PUBLISHER BE TOTALLY BANNED BY THE SECURITIES AND EXCHANGE COMMISSION FROM PUBLISHING TRUTHFUL FINANCIAL OR ECONOMIC INFORMATION REGARDING INVESTMENTS IN SECURITIES SOLELY BECAUSE OF THE PUBLISHER'S PRIOR CRIMINAL RECORD?

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BRIEF OF FINANCIAL PUBLISHERS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS

The Financial Publishers of America (the "Association") is a nonprofit corporation that was recently organized under the laws of the District of Columbia to serve as a forum for publishers of books, magazines, newsletters and other media espousing a financial or economic theme. As an industry association, the Financial Publishers of America seeks to pro-

mote high standards of professionalism among its members as well as financial writers, generally.[1] Fulfilling another fundamental purpose of the Association, filing this brief is an important step in speaking out as a public advocate for the common interests of its members.

The central role of the financial publishing industry is to supply information about matters of great interest and significance to the investing public. Thus, preserving the constitutional right of any publisher to publish financial material that is neither misleading nor unlawful is the industry's most vital concern.

STATEMENT OF THE CASE

Amicus relies on the statement of the case presented by Petitioners. Petition at pp. 3-8. For purposes of this Brief, only the essential points as set forth in the Petition and decisions below are recapitulated here.

A. Background

Petitioners are publishers of a number of different investment newsletters which comment on the securities markets, taking into account short- and long-term financial forecasts and relevant trends, as well as consideration of the underlying economic and political factors that influence the value of investments. Subscribers pay a fee for the right to receive the information contained in Petitioners' publications.

While their newsletters will typically recommend that specific securities, or groups of securities, be purchased, sold or held, Petitioners themselves do not execute (or offer to execute) any transactions for their subscribers, whether based on such recommendations or otherwise. Petitioners do not, apparently,

[1] None of the Petitioners is, or has been, either an individual or corporate member of the Association. However, while the Association certainly does not condone Mr. Lowe's past conduct, his professional activity as the publisher of investment newsletters places him and his publications squarely in the community whose interests the Association seeks to serve. Defending freedom of the press is essential in a case such as this even though the victim here, like many other claimants under the First Amendment, may be less than pure.

have any personal relationships with their subscribers, nor do they have any specific knowledge of their subscribers' holdings or investment portfolios. Moreover, Petitioners have absolutely no delegated authority and can exercise no judgment or other discretion with respect to their subscribers' actual trading accounts.

Critically, the case against Petitioners does not involve accusations of "scalping,"[2] or other misuse or distortion of published information. The Securities and Exchange Commission ("SEC") does not allege that Petitioners took any improper advantage of information published in their newsletters. In fact, the district court judge, Chief Judge Weinstein, specifically stated that Petitioners' readers were pleased with the investment news provided in the publications. *SEC v. Lowe*, 556 F. Supp. 1359, 1361 (E.D.N.Y. 1983) ("Subscribers to these services called as witnesses by the SEC generally were satisfied with what they received."), *rev'd.* 725 F.2d 892 (2d Cir. 1984), *petition for cert. filed* (U.S. May 16, 1984) (No. 83-1911).

Although Petitioners published their newsletters and communicated financial information apparently without fault, Lowe's conduct in certain other respects was undeniably improper. Specifically, an administrative law judge found that Lowe had misappropriated client funds when he was acting as a personal investment adviser and had failed to amend his corporation's investment adviser registration statement promptly to disclose his criminal record. Consequently, the SEC ordered that Mr. Lowe be banned from associating with any investment adviser and simultaneously revoked his registration under section 203(e) and (f) of the Investment Advisers Act of 1940 (the "Advisers Act"), 15 U.S.C. § 80b-3(e), (f).

Having had his investment adviser's registration revoked, Lowe stopped handling any client funds or accounts. He ceased functioning as an investment adviser in the traditional sense

[2] "Scalping" is the unlawful practice whereby an investment adviser recommends a security in order to profit personally from the short-term price effect induced by the recommendation itself. *See, generally, SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963).

and limited his activities to the publication of investment newsletters. Nevertheless, the SEC insisted that Lowe could not even continue publishing the newsletters without being registered because any such publication technically constituted engaging in the business of an investment adviser. Thus, even after his hands were effectively tied, the SEC sought an injunction to silence Lowe's publications forever.

B. Proceedings Below

Four distinguished jurists have written opinions disagreeing on the important constitutional and regulatory issues now before this Court. Chief Judge Weinstein of the Eastern District of New York decided against granting the SEC's request for an injunction. Finding that "[t]he authority to impose blanket suppression through prior restraint on would-be publishers of impersonal market information . . . has not . . . been recognized by the Supreme Court," 556 F. Supp. at 1369, the Chief Judge refused to enjoin the very publication of Petitioners' newsletters without proof they contained fraudulent speech or misleading information. Chief Judge Weinstein did, however, enjoin Lowe from acting as a personal investment adviser and giving clients advice over a telephone hotline.

Splitting two to one, the Court of Appeals for the Second Circuit reversed the lower court with all three judges on the panel writing separate opinions. Judge Brieant argued in dissent that "the right to licensure, and the concomitant power to restrict entry into the licensed occupation, does not in America extend to writers or publishers." *SEC v. Lowe*, 725 F.2d at 908 (Brieant, J., dissenting). Thus, he concluded that a publisher, even a financial publisher, was entitled to freedom from prior restraint under the First Amendment unless his speech was unprotected by virtue of its deceptive or misleading content.

SUMMARY OF ARGUMENT

The injunction ordered by the Court of Appeals, reversing the District Court, is a clear-cut prior restraint banning the publication of financial information that is neither untruthful nor misleading. The SEC may not under the First Amendment expand its regulatory authority to allow total censorship based solely on the prior criminal record of a financial publisher.

The injunction violates the First Amendment because it utterly denies free speech and freedom of the press without even pretending to balance the Constitution against investor protection.

The Advisers Act, moreover, does not require the SEC to censor Petitioners. The injunction to that effect is unnecessary not only because the censored information is not deceptive, but also because the SEC could instead require full disclosure of the publisher's criminal record to protect investors. Thus, the prior restraint granted to the SEC by the Court of Appeals is clearly more extensive than necessary to serve the public interest; the injunction must be overturned so that Petitioners' constitutional rights can be reconciled with the purposes of the Act.

ARGUMENT

I. THE SECURITIES LAWS DO NOT JUSTIFY THE SEC'S ATTEMPTS TO EXPAND ITS REGULATORY AUTHORITY BY INFRINGING CONSTITUTIONAL RIGHTS OR INTERFERING WITH OTHER ACTIVITIES

Appropriately, the SEC has always administered the laws under its charge with aggressive zeal. For its vigilance, the SEC has earned a well-deserved reputation as a regulatory agency of special competence. But, from time to time, such eager pursuit of its objectives has carried the SEC across the proper boundaries of its mandate and into conflict with competing interests. Accordingly, this Court has more than once recognized the need to balance the securities laws, and the SEC's salutary enforce-

ment thereof, with other legal norms. In *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Daniel*, 439 U.S. 551 (1979), Justice Powell acknowledged that

> "[o]n a number of occasions in recent years this Court has found it necessary to reject the SEC's interpretation of various provisions of the Securities Acts. *See SEC v. Sloan*, 436 U.S. 103, 117-119, 98 S. Ct. 1702, 1711-1712, 56 L.Ed.2d 148 (1978); *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 41 n.27, 97 S.Ct. 926, 949, 51 L.Ed.2d 124 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212-214, 96 S.Ct. 1375, 1390-1391, 47 L.Ed.2d 668 (1976); *Forman*, 421 U.S., at 858 n.25, 95 S.Ct., at 2063; *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 759 n.4, 95 S.Ct. 1917, 1936, 44 L.Ed.2d 539 (1975) (POWELL, J., concurring); *Reliance Electric Co. v. Emerson Electric Co.*, 404 U.S. 418, 425-427, 92 S.Ct. 596, 600-602, 30 L.Ed.2d 575 (1972)."

Id. at 566 n.20.

The Court declined in *Daniel* to extend the securities laws where doing so would compete with existing "comprehensive legislation" (*i.e.*, the national labor laws) also touching the same issue. *Id.* at 569. Similarly, in *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977), this Court refused to permit regulation under the securities laws to override "established state policies of corporate regulation." *Id.* at 479.

The two brief examples discussed above suggest that it is utterly inconceivable that the same securities laws that have yielded to overlapping federal labor law and state corporation law should not also make room for the First Amendment. In the words of Judge Danaher, such a result would "ensconce 'administrative absolutism' at its unreachable zenith." *SEC v. Wall Street Transcript Corp.*, 422 F.2d 1371, 1385 (2d Cir.) (Danaher, J., concurring in remand), *cert. denied*, 398 U.S. 958 (1970). *See also Dirks v. SEC*, 103 S. Ct. 3255, 3266 (1983) (some limiting principle must apply to SEC regulation).

II. REGULATION OF INVESTMENT ADVISERS MUST RESPECT THE FIRST AMENDMENT SO AS TO AVOID AN ABSOLUTE DENIAL OF FREEDOM OF THE PRESS THAT WOULD ENTIRELY DEPRIVE A FINANCIAL PUBLISHER OF HIS RIGHT TO SPEAK

A. The Injunction Granted to the SEC Permits Total Censorship and Must Be Overturned Under the First Amendment.

Forcing Lowe to stop the press and terminate his publications is a textbook case of absolute prior restraint. It comes before the Court "bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

Although the opinions below tread heavily on the doctrine of "commercial speech," *amicus* respectfully submits that the Court need not parse that distinction to decide this case.[3] *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Whether investment newsletters are merely "commercial speech" entitled to qualified First Amendment protection, or fully protected speech, Petitioners' rights under the First Amendment have in this case been regulated out of existence entirely.

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[3] *Amicus* would contend that Petitioners' speech is not "commercial" because, as articulated by Chief Judge Weinstein, "the combination of fact, economic and political analyses, conjecture, and recommendation characteristic of investment newsletters places them outside the rubric of commercial speech . . . ." *SEC v. Lowe*, 556 F. Supp. at 1367. *See also SEC v. Lowe*, 725 F.2d at 906 (Brieant, J., dissenting) (after *Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. 2875 (1983), commercial speech that goes beyond mere advertising and implicates "substantial individual and societal interests" is entitled to full First Amendment protection from prior restraint).

The Court of Appeals' injunction provides the SEC with the power to impose a total ban on Petitioners' expression *per se*.[4] This despite the fact that *Lowe is a publisher and Petitioners' publications are free from false, deceptive or misleading speech.* Under these circumstances, such blanket suppression of Petitioners' lawful speech plainly violates the First Amendment and cannot stand. *Cf. Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977).

B. The Advisers Act Need Not Be Read to Abridge Freedoms Guaranteed by the First Amendment

As Chief Judge Weinstein succinctly stated, the "[Advisers] Act should be construed to steer clear of possible infringements on freedom of the press." 556 F. Supp. at 1368. This wise guidance is constitutionally required and perfectly feasible.

1. The Advisers Act can be read flexibly to give effect to Petitioners' constitutional rights.

As discussed earlier, there is ample precedent and good reason for construing the securities laws to accommodate other applicable legal norms. Similarly, reading the Advisers Act technically to compel a clash with the First Amendment can be easily avoided here by following this Court's guideline, and the SEC's enthusiastic refrain, that "Congress intended the Investment Advisers Act of 1940 to be construed . . . not technically and restrictively, but flexibly to effectuate its remedial purposes." *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963).

To that end, Congress gave the SEC the authority to exempt any class of persons from any provisions of the Advisers

[4] In the Second Circuit's majority opinion, Judge Oakes allowed as how Lowe was censored only with respect to the publication of his newsletters and nothing more. Lowe was "free" to exercise his First Amendment rights so long as he would choose to talk on different topics or speak through other media. *SEC v. Lowe*, 725 F.2d at 902. Such procrustean compromise with the basic guarantees of speech and press simply does not withstand objective analysis.

Act when required "in the public interest." Advisers Act, § 206A, 15 U.S.C. § 80b-6a. Surely, it is *in the public interest* to contain the exercise of the SEC's regulatory authority in places where it "might collide with the guarantees of the First Amendment." *NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760*, 377 U.S. 58, 63 (1964).

The *Wall Street Transcript* decision cited prominently by the SEC in this litigation is not to the contrary. *SEC v. Wall Street Transcript Corp., supra*, 422 F.2d 1371. That case involved an SEC subpoena enforcement action where a financial publication contested access to its records. The publication fought the subpoena on the theory that, as a member of the press, the First Amendment precluded any regulation of its activities. The Court of Appeals ordered enforcement of the SEC's subpoena there to determine whether the publication was in fact a vehicle for distributing investment advice that might be subject to the agency's proper regulation of investment advisers.

Significantly, the court recognized the clear constitutional limits of the SEC's regulatory authority. It crisply distinguished investigation of a publication's activities, on the one hand, and pulling the plug, on the other. "[E]ven if a newspaper is engaging in commercial practices which may be regulated, *the [Advisers] Act grants no authority for review or censorship by the Commission* of investment advisory material *prior to its publication.*" *Id.* at 1380 n.13 (emphasis added).

Unlike the *Wall Street Transcript*, Petitioners here had actually registered under the Advisers Act and were evidently not seeking to evade regulation by the SEC while continuing to publish their newsletters. As the decision in *Wall Street Transcript* makes plain, there is a critical legal distinction between the disclosure requirements under the Advisers Act and the total censorship requested by the SEC.

2. The fundamental purpose of the Advisers Act is disclosure not censorship.

Like the securities laws generally, the "core of the [Advisers] Act" is *disclosure* of fairly detailed information by

investment advisers regarding their qualifications. *SEC v. Blavin*, 557 F. Supp. 1304, 1309 (E.D. Mich. 1983) (citing *Wall Street Transcript, supra*, 422 F.2d at 1376). "[P]rotecting investors through the prophylaxis of disclosure" is the principal purpose of the Advisers Act. *SEC v. Capital Gains Research Bureau, Inc., supra*, 375 U.S. at 200.[5] Thus, the basic thrust of both the First Amendment and the Advisers Act is the same: to preserve the full and free flow of information to all concerned.

In *Blavin*, the Act's insistence on disclosure and other formalities of regulation was approved specifically because it would not have the effect of the injunction before this Court now.

> "[I]n contrast to the situation in *Lowe*, the SEC is seeking to force Blavin to comply with the registration and disclosure provisions of the Act, and to prevent him from recommending stock in which he has a conflict of interest without disclosing that conflict. *It is true that the SEC has no authority to review, censor, or in any way restrain investment advisory material prior to publication. If Blavin fully complies with the recording, reporting, and disclosure requirements of the Act, he must be allowed to register for the purpose of publishing and be allowed to publish. The First Amendment protects this right. He cannot be cited or enjoined from a violation of the registration provisions of the Advisers Act insofar as his activities are limited to publishing.*"

SEC v. Blavin, supra, 557 F. Supp. at 1310 (emphasis added).[6] Chief Judge Weinstein denied the SEC's request for an injunction in this case using almost precisely the same words:

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[5] To be sure, *Capital Gains* noted that the Advisers Act did exact certain fiduciary standards. However, the Court in *Capital Gains* addressed its decision to the problem of *nondisclosure—i.e.*, the failure of an investment adviser to disclose its "scalping" (as a material fact) and the inherent financial conflict of interest. 375 U.S. at 196-201.

[6] While the majority opinion in the Second Circuit's *Lowe* decision suggested that the SEC's censorship of Petitioners was permissible licensing of professionals, relevant authorities indicate that full disclosure, open channels of communication and the free flow of information are preferable to shutting

footnote continued

> "When a publisher who has been denied registration or against whom sanctions have been invoked fully complies with the record, reporting and disclosure requirements under the Act, *he must be allowed to register for the purpose of publishing and to publish.*"

SEC v. Lowe, 556 F. Supp. at 1369 (emphasis added).

C. The SEC's Prior Restraint Against Petitioners Is Not Necessary to Protect Investors Under the Advisers Act and Is More Restrictive Than Permitted by the First Amendment

1. Full disclosure of criminal violations will protect investors.

As Chief Judge Weinstein indicated, the SEC may prescribe (by rule) that investment advisers be required to disclose publicly their criminal convictions. *SEC v. Lowe*, 556 F. Supp. at 1370 (discussing authority of SEC under section 204 of the Advisers Act, 15 U.S.C. § 80b-4). Specifically, in Advisers Act Rule 204-3, 17 C.F.R. § 275.204-3, the SEC could seek to require such disclosure to advisory clients, but has not so far chosen to do so.

Disclosure of Lowe's criminal convictions would obviously permit his subscribers to evaluate the validity of his judgment and the worth of his publications. This piece of information may be all the notice and advance protection they need, and probably want. Without face to face contact, Lowe has no "undue influence" over his subscribers,[7] and his publishing

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footnote continues

off regulated speech entirely. *Bates v. State Bar of Arizona*, 433 U.S. 350, 365 (1977). *See also Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n. 32, (1978); *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976); *United States v. Harriss*, 347 U.S. 612, 625-26 (1954). Even potentially misleading information cannot be banned completely if it can be presented with an explanation or disclaimer. *See In re R.M.J.*, 455 U.S. 191 (1982).

[7] *Cf. Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 449, 455 (1978) (distinguishing a lawyer's solicitations by personal visits as opposed to solicitations by print advertising; the former "breeds undue influence" while the latter does not).

activities do not entail any control over his subscribers' trading in securities, or over any of their invested funds.[8]

2. A total ban on publications is a lopsided remedy that protects investors more restrictively than the First Amendment allows.

As a general principle, this Court has left no doubt that when confronting the dangers of suppression and the dangers of freely flowing information, the First Amendment choice is clear. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra,* 425 U.S. at 770. Furthermore, the Court's decision in *Bigelow v. Virginia,* 421 U.S. 809 (1975), held that "a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Id.* at 826 (also noting "more serious First Amendment overtones" of applying regulatory statute to newspaper editor).

When applying the First Amendment to the public interest in regulation under the Advisers Act, a court would have to strike down an absolute prior restraint on truthful speech if it is any "more extensive than is necessary to serve that interest." *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,* 447 U.S. 557, 566 (1980).

Here, the SEC has obtained a prior restraint injunction to champion presumed investor interests. But precisely from what risks do Petitioners' subscribers need to be protected that could outweigh the requirements of the First Amendment? Lowe manages no money for them; he has no access to their trading accounts or to the private details of their portfolios; and, not only has he never been accused of "scalping," but his publications appear to be considered truthful and, perhaps, useful.

Given the presumed regulatory power to prescribe disclosure, and the other real constraints on Lowe's influence discussed above, it is plain that the SEC has unconstitutionally

[8] It should again be emphasized that what Petitioners seek from the SEC is freedom from total censorship. Accordingly, the "impersonal adviser" concept of Chief Judge Weinstein is useful to analyze the First Amendment issues, and is consistent with *Ohralik,* but would not here require that the Court strike down the statute's regulatory scheme.

ignored Petitioners' right of free speech as well as the public's right to a free press (including the right of willing listeners to hear out willing speakers). Thus, the SEC's most restrictive injunction must be lifted in exchange for a remedy that is "no broader than reasonably necessary to prevent the deception." *In re R.M.J., supra,* 455 U.S. at 203. And, combining the words of two of the four learned judges who considered this case below,

> "for what is all this great effort? I [Judge Brieant] agree with Chief Judge Weinstein below that '*the censorship that the SEC would impose on Lowe is more extreme than necessary to effectuate the congressional goal of a confident and informed investing public,*' (556 F.Supp. at 1366) and therefore a balancing of the equities requires that no injunction issue."

SEC v. Lowe, supra, 725 F.2d at 910 (Brieant, J., dissenting) (emphasis added).

Total, one hundred percent and absolute protection of investors is not feasible in any event; and, in light of the sacrifice of fundamental constitutional rights, it is almost certainly not socially desirable. The marginal loss of assured protection, if any, is a relatively small cost for preservation of the First Amendment.

If Lowe ever does change his current tack and begins publishing questionable information in his publications, or otherwise jeopardizes his subscribers, the SEC has the ammunition to step in and end those potential abuses. Instead, the SEC has chosen to jump prematurely to restrain Petitioners before any allegations or suspicions of deception have been charged. Such categorical action at this time is unreasonably broad, unduly restrictive, and more extensive than necessary to protect the public interest; most important, it is, therefore, clearly unconstitutional.

CONCLUSION

For the foregoing reasons, the Financial Publishers of America respectfully requests that this Court grant certiorari to correct the violation of the First Amendment that will result if the injunction ordered by the Court of Appeals is not reversed.

Dated: Washington, D.C.
June 22, 1984

Respectfully submitted,

/s/ RALPH C. FERRARA

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I, Ralph C. Ferrara, a member of the Bar of this Court, do hereby certify that I caused three copies each of the annexed Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* to be served by mail, first-class postage prepaid, this 22nd day of June 1984, upon the following counsel:

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